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Nos. 79-1429 and 79-1583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL.,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.,
Respondents.

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SECOND SUPPLEMENTAL MEMORANDUM OF UNION RESPONDENTS

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Petitioners have not contented themselves with a response to the Secretary's suggestion that "it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development" (Fed. Resp. Supp. Mem. p. 4). Instead the petitioners have taken the occasion to sug-

gest an alternative extraordinary procedure for the handling of this case: that "it would be more appropriate for this Court simply to hold these cases in abeyance and to remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings" (Pet. App. Mem. p. 4).

As we show below, that alternative not only suffers from the same basic defect as its predecessor advanced by the Secretary but also makes no practical sense on its own terms. Because we had not anticipated that petitioners in their response to the Secretary would make a new proposal of their own, we tender the following brief comments on their submission.

1. In response to the Secretary's memorandum we showed that the *statutory* issue now before the Court involves the scope of the Secretary's authority to weigh the costs and benefits of a standard designed to protect employees from occupational exposure to a toxic substance. The propriety of the Secretary's proposed rulemaking may turn on the resolution of that issue. That resolution depends on the proper interpretation of an act of Congress, a matter peculiarly in this Court's province, not on the view of any particular administration. The petitioners forthrightly acknowledge that the statutory issue stands at the threshhold of the proposed rulemaking: "OSHA plans 'to reexamine its previous position' that use of cost-benefit analyzing in the setting of standards for toxic substances would be inconsistent with the Occupational Safety and Health Act of 1970. . . ." Pet. Supp. Mem. at 2. Accordingly, the reasons that we gave for rejecting the Secretary's suggestions apply equally to the alternative suggestion of petitioners.

2. Petitioners' memorandum neatly and succinctly exposes a fatal error in the Secretary's proposal that the judgment of the court below be vacated and the proceeding remanded (Pet. Supp. Mem. at 3):

In petitioners' view, such a course of action would be appropriate if the Secretary had withdrawn the Cotton Dust Standard or explicitly conceded its invalidity. *See EPA* v. *Brown*, 431 U.S. 99 (1977). The Secretary, however, has not withdrawn the Standard. To the contrary, OSHA has stated its intention to leave the Standard in effect while the proposed rulemaking proceeds.[3]

[3] Because the Standard remains in effect (and because there is no suggestion that the court of appeals should reconsider its decision in light of an intervening Supreme Court decision), *Cotton Warehouse Ass'n* v. *Marshall*, 49 U.S.L.W. 3244 (U.S. 1980), is not in point.

Petitioners' alternative suggestion contains procedural deficiencies of similar magnitude, albeit of a different nature. Petitioners would have this Court "hold these cases in abeyance and . . . remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings." Pet. App. Supp. Mem. at 4.[1] When the further rulemaking proceedings are completed, this Court would then, under petitioners' suggestion, "determine what disposition should be made of the pending cases." *Ibid.* In the normal course new rulemaking proceedings would be sub-

[1] Petitioners' request that while the case is being held in this Court the record be returned to the Secretary appears to be prompted by a desire to demonstrate that their suggestion accomplishes something of substance. But sending the record back to the Secretary would be pointless paper shuffling, since the Secretary has all the information in the record at his disposal and can, and perhaps is required to, take notice in his new rulemaking proceedings of any evidence in the prior related proceeding, cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 157. Alternatively the petitioners may be motivated by the view that so long as the validity of the present standard is *sub judice* the Secretary has no power to act to modify that standard. While we are not certain on the point, that view may well be correct. If it is, it confirms our suggestion that the Secretary's "advance notice of a proposed rulemaking" is wholly without legal effect and is therefore not a predicate for either the Secretary's or the petitioners' suggestions.

ject in the first instance to review in a court of appeals. Petitioners' suggestion that this Court hold these cases until completion of such proceedings necessarily contemplates either *direct* review of the proposed proceedings in this Court, or review by this Court of the old standard notwithstanding that the new proceedings—which may alter the substance of the standard and will, in any event, alter the content of the record and of the Secretary's findings—have been completed. Neither of these alternatives makes good sense.

The cases should be decided now so that all parties will know as soon as possible whether the inquiry the Secretary proposes to undertake in further rulemaking proceedings is permitted by the statute and, if so, whatever guidelines or limitations apply to such an inquiry.

Respectfully submitted,

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